SUPREME COURT, U. S.

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No. 729

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL UNION 3-3, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, International Woodworkers of America, Local Union 3-3, AFL-CIO, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit denying petitioner leave to intervene in a case wherein the Court had issued a decree upholding a remedial order of the National Labor Relations Board.

Opinions Below

The 1964 Decision and Order of the National Labor Relations Board in this matter (*Western Wirebound Box Co.*) is reported at 145 NLRB 1539. The January 19, 1966 opin-

ion of the Court of Appeals for the Ninth Circuit upholding that Board ruling (356 F. 2d 88) is printed in Appendix A, *infra* p. 1A; the February 19, 1966 decree of the Court enforcing the Board's remedial order is printed in Appendix B, *infra* p. 8A. Without opinion, the Court of Appeals issued an order on August 9, 1968 (Appendix E, *infra* p. 19A) denying the Union's petition to intervene for the purpose of requiring the National Labor Relations Board to show cause why it has not sought to compel obedience to the Court's decree.

Jurisdiction

The order of the United States Court of Appeals for the Ninth Circuit denying the Union leave to intervene was entered on August 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

In view of *Auto Workers* v. *Scofield*, 382 U.S. 205, which holds that since 1947 "private rights" are secured within the scheme of the National Labor Relations Act, does this Court's earlier ruling in *Amalgamated Utility Workers* (309 U.S. 261) now preclude judicial recourse to a union aggrieved by Labor Board refusal to secure strikers' rights protected by a court-enforced order of the Board?

Statute Involved

National Labor Relations Act, as amended, Section 10(f), 29 U.S.C. § 160(f):

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to

have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

Statement of Facts

Petitioner brings here a ruling barring a union from intervening in the Court of Appeals to seek redress of striker-reinstatement rights secured by a court-enforced order of the National Labor Relations Board. The Union's application to the Court below followed six fruitless years of effort to bring the employer, Western Wirebound Box Company, into compliance with the National Labor Relations Act. We set forth below the sequence of events culminating in the present proceeding:

1. *The 1962 unfair labor practice strike.* In June of 1961, Local Union No. 3-3, International Woodworkers of America, AFL-CIO, negotiated a collective bargaining agreement [1] governing employees of Western Wirebound

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[1] "Exhibits Supplemental to Affidavit of Harvey R. Nelson", No. 8. Hereinafter we refer to these documents as "Petitioner's Exhibits."

Box Company. The agreement (Article XIV) was subject to automatic annual renewal in the absence of a 60-day notice of desire for change or termination. Prior to June 1962 both sides asked for wage rate changes, and extensive negotiations were had thereon. The Company there sought to support its proposal for an 8-cent per hour wage reduction on grounds of competitive pressure and a claim that excessive cost increases had resulted from an earlier wage raise (see *Western Wirebound Box Co.*, 145 NLRB at 1543). In response, the Union asked for cost-productivity data substantiating the Company's claims but the data was repeatedly refused (*ibid.*). Having failed to obtain disclosure of facts relevant for bargaining the wage issue, and negotiations having thereby been stalemated, the Union went on strike on June 11, 1962.

2. *The Board's finding of employer violation and order of reinstatement.* Upon a Union charge of refusal to bargain, in due course a Labor Board unfair labor practice complaint issued against the Company and went to hearing before a Board Trial Examiner. On October 23, 1963, the Examiner found the Company in violation of the statute (145 NLRB at 1542-1547). The Examiner rejected the Company's claim of inability to produce the data sought, as well as its legal contention that for purposes of the statutory duty of disclosure (*Labor Board v. Truitt Mfg. Co.*, 351 U.S. 149), there is a "difference between a plea of inability to pay and a claim that price competition is so serious that wage costs must be lessened. . . ." Having found the Company's statutory violation to have precipitated the strike, the Examiner required that upon application it "reinstate any striker to his former or substantially equivalent position" (145 NLRB at 1546). Within a few weeks, the Company returned most of the strikers to employment, but at all times since it has refused to grant them the same pay

and seniority rights in effect at the time that the strike commenced.[2] Upon appeals from the Examiner's rulings, on February 6, 1964, the Labor Board issued its Decision and Order affirming the finding of Company refusal to bargain in good faith, and strengthening the recommended order as concerns striker reinstatement rights (145 NLRB 1539, 1540-41), requiring reinstatement *"without prejudice to their seniority or other rights and privileges."*

3. *The Court of Appeals enforcement decree.* The Company did not comply with the Board's 1964 Decision and Order. Instead, it continued to engage in a variety of continuing and serious violations (Nelson affidavit pp. 9-10, 28-36). As late as March of 1965, it engaged in such flagrant conduct as introducing into the stalemated bargaining negotiations a "committee" purporting to represent "non-union" employees, and offering a contract recognizing the union as bargaining agent for its members only (Nelson affidavit, pp. 30-32). On May 6, 1965, the Labor Board was finally forced to file in the Court of Appeals for the Ninth Circuit a petition to enforce its Decision and Order of February 6, 1964. In that proceeding the Court of Appeals issued its opinion on January 19, 1966 (*NLRB* v. *Western Wirebound Box Co.*, 356 F. 2d 88; Appendix A, *infra* p. 1A), upholding the Board's ruling against a variety of Company objections. In so doing the Court emphasized that collective bargaining negotiations "are to be at arms length but this does not contemplate erection of artificial barriers and resort to patent technicalities to obfuscate the proceedings." On February 19, 1966, the Court issued its enforcement decree (Appendix B, *infra* p. 8A), which includes an order (*infra*, pp. 8A-9A) that the Company grant the strikers "full reinstatement to their former

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[2] Affidavit of Harvey R. Nelson, pp. 3-20. Hereafter we refer to this document as "Nelson affidavit".

or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. . . ."

4. *Continuing violation of the reinstatement order.* Notwithstanding the Court's decree, the Company has continued its violation. In particular, it has refused to honor the threshold mandate of the Board order and the Court decree to give the unfair labor practice strikers full reinstatement "without prejudice to their seniority". From the time that the strikers returned to employment in 1963 (see Petitioner's Exhibit No. 1, pp. 5-7; No. 10, p. 2) the Company has repeatedly and continuously taken the position that after "expiration" of the 1961 contract seniority has been eliminated *"altogether"* by unilateral decision of the employer, and the strikers' pre-strike seniority rights need not now be honored. See Petitioner's Exhibit 4, p. 3; Exhibit 6, p. 1, Exhibit 11, pp. 1, 3; Exhibit 17, p. 1; Exhibit 43, p. 2. The Company has adopted the position (Petitioner's Exhibit 11, pp. 1, 3) that following the strike it would not "grant any Seniority rights at all", because it does not feel that "replacements" hired during the strike "should be at the bottom of the list" or "drop down in seniority below Union members". Pursuant to its claimed unilateral right to abolish the seniority system, the Company has put returned strikers in positions inferior to those they held at the commencement of the strike (Nelson affidavit, pp. 4-7; Petitioner's Exhibit 16, pp. 4-7); has shunted returned strikers from job to job without regard to their seniority (*ibid.;* Petitioner's Exhibits No. 4, 5); and by refusing them the plant-wide seniority "bumping" guaranteed prior to the strike by the contract,[3] it has forced them

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[3] The 1961 agreement provided that "In cases of enforced lay-off or rehiring, seniority shall be respected, first with respect to and within the classification; second, within the the department and third, within the plant." Petitioner's Exhibit 8, Article VI.

on lay-off incident to the shutdown of certain plant operations (Petitioner's Exhibit No. 6, p. 1; No. 7; No. 4, pp. 2-3).

5. *The Board's refusal to secure compliance.* Since the entry of the Court of Appeals decree in February of 1966 the Union has unceasingly sought to persuade the Labor Board to take action with respect to the Company's default of compliance.[4] The Union urges that the decree and Board order award to the reinstated strikers the continued benefit of their pre-strike seniority rights. The Board, however, does not agree that the requirement of full reinstatement with unimpaired seniority for unfair labor practice strikers is violated by an outright and general abolition of seniority in employee job placements, transfers, and layoffs. In a ruling by the Acting Regional Director on April 22, 1966, the Board declined to take action with respect to the abrogation of reinstated strikers' seniority in a 1965 layoff of employees, stating that "further proceedings are not warranted" because "at the time the Green Department was closed, there was no collective bargaining agreement in effect; therefore, the employer had no contractual obligation to observe seniority."[5] Thus the Board agrees with the Company position that the 1961 contract terminated and pre-strike seniority is no longer binding even for strikers required to be reinstated "without prejudice to their seniority".

6. *Petitioner's application to intervene in the Court of Appeals.* Having failed in six years of effort to obtain compliance by the Company with the statutory rights of its members, on July 2, 1968 the Union petitioned the Court

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[4] See Petitioner's Exhibits 2, 3, 18, 24, 27, 36, 39.

[5] As stated most recently in a communication of October 7, 1968 from the Board's Acting Regional Director (Subregion 36) to counsel for the Union ". . . the agency is not prepared to take the position you have urged: That the 1961 contract had renewed itself, or that its provisions (except wages) are required by the decree to be currently in effect. . .".

of Appeals for the Ninth Circuit for leave to intervene (Appendix C, *infra,* p. 10A) for the purpose of requiring the Labor Board to show cause why the 1966 decree of the Court has not been complied with, and "why the National Labor Relations Board has not sought to compel the respondent, Western Wirebound Box Co., to comply with the decree of this Court." The petition was accompanied by extensive documentation of the Company's continuing default and the unavailing Union efforts to have the Labor Board require compliance with the decree, and particularly with its striker reinstatement requirements.

The Board (and the Company) opposed the petition for intervention on the ground that proceedings to compel compliance with a decree enforcing a Labor Board order are to enforce "public rights" and "may be instituted only by the Board" (Appendix D, *infra,* pp. 12A-18A). Cited for that proposition was this Court's decision in *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U.S. 261 (as reapproved in *Southport Petroleum Co.* v. *NLRB,* 315 U.S. 100, 106), and subsequent circuit court rulings. The Board urged (*infra,* pp. 15A-18A) the continuing validity of *Amalgamated Utility Workers* against petitioner's contention that in *Auto Workers* v. *Scofield,* 382 U.S. 205, this Court found the "public rights" rationale of *Amalgamated* eroded by 1947 amendments to the National Labor Relations Act. The interplay of this Court's rulings in *Amalgamated* and *Scofield,* all parties agreed, was determinative of petitioner's right to intervene.

7. *The ruling below. Scofield* notwithstanding, the Court of Appeals was apparently persuaded of the continuing vitality of *Amalgamated Utility Workers.* By an Order of August 9, 1968 (Appendix E, *infra,* p. 19A), the Court summarily refused intervention:

"The motion of International Woodworkers of

America, Local Union 3-3, AFL-CIO, for leave to intervene herein for the purpose of compelling the National Labor Relations Board to show cause to this Court why the decree of this Court, entered herein on February 19, 1966, following the opinion filed herein on January 19, 1966, 356 F. 2d 88, has not been complied with, and to further show cause why the National Labor Relations Board has not sought to compel respondent Western Wirebound Box Co. to comply with the decree of this Court, is Denied."

Petitioner thus brings here for resolution an important question concerning the effect upon *Amalgamated* and its "public rights" rationale of this Court's *Scofield* finding that after 1947 the statute also secures private rights and the Labor Board now "serves substantially as an organ for adjudicating private disputes".

REASONS FOR GRANTING THE WRIT

This Case Presents an Important Question of Federal Law Concerning the Impact on Amalgamated Utility Workers (309 U.S. 261) of the 1947 Amendments securing Private Rights Within the Scheme of the National Labor Relations Act.

In *Auto Workers* v. *Scofield*, 382 U.S. 205, in upholding a charging party union's right to intervene in the Court of Appeals on the side of the Labor Board, this Court found that the "public rights" rationale of *Amalgamated Utility Workers* has been eroded by the Taft-Hartley amendments—that "since 1947" the Labor Board *"serves substantially as an organ for adjudicating private disputes"*. An important federal question presented in this case is how far, after the 1947 amendments securing pri-

vate rights within the scheme of the National Labor Relations Act, this Court's *Amalgamated Utility Workers* decision still precludes judicial recourse to a party asserting violation of his rights secured by a remedial order of the Labor Board.

i. ***But for Amalgamated Utility Workers petitioner has clear statutory standing to proceed in the Court of Appeals.***

Since petitioner claims violation of strikers' reinstatement rights under the National Labor Relations Act, its "aggrievement" standing is plain from the face of the statutory provision for judicial review in Labor Board proceedings. Since first enacted, Section 10(f) of the National Labor Relations Act (29 U.S.C. § 160(f)) has provided judicial review to a "person aggrieved" by a final order of the Board "*denying in whole or in part the relief sought . . .*". Aggrieved status normally first arises for either the charging party or the respondent from the Decision and Order of the Board adjudicating the contested issue of statutory violation. But frequently the initial litigation leaves open key remedial issues appropriately postponed until entry and review of a Board finding of violation. Back pay, for instance, is as a matter of course computed only in ancillary compliance proceedings. Similarly, in cases such as the instant one where the Board's Decision and Order finds that an ongoing strike resulted from the employer's unfair labor practice, it requires prompt reinstatement of the strikers; and questions of obedience to that requirement necessarily arise only in subsequent compliance proceedings. There the charging party not originally aggrieved by the Board's Decision and Order (finding a statutory violation by the respondent) may become aggrieved by the Board's subsequent action "denying in whole or in part the relief sought" in

the remedial proceedings. Plainly, a charging party refused relief he believes owing to him at the compliance stage of Board proceedings is a "person aggrieved" by the Board's action (or inaction) within the meaning of Section 10(f) of the statute.[6]

But charging party efforts to win judicial review and redress at the compliance stage of Board proceedings have long been hampered by this Court's 1940 ruling in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261. There the Court denied a charging party statutory standing under an enforced order of the Board to prosecute a contempt action in the Circuit Court. In rejecting union standing to initiate a contempt proceeding, this Court adopted a broad "public rights" approach to the National Labor Relations Act, and held that Congress entrusted the protection of rights under the statute exclusively to the enforcing authority of the Board. But in view of this Court's recent pronouncements in the *Scofield* case, it is to be doubted whether following the 1947 NLRA amendments the basic rationale of *Amalgamated Utility Workers* may be deemed to have continuing vitality.

ii. *This Court's ruling in Auto Workers v. Scofield, 382 U.S. 205, found that the "public rights" rationale of Amalgamated Utility Workers did not survive the 1947 NLRA amendments.*

The *Scofield* opinion gave express consideration to the "public rights" thesis of *Amalgamated* and rejected it as a ground for denying charging party intervention on the side of the Labor Board in judicial review proceedings. This Court found that the 1947 NLRA amendments (which, *inter alia*, added prohibitions on unfair union practices to

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[6] Cf. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129.

the existing curbs on employers) brought "private" rights within the statutory scheme (382 U.S. at 217-220):

> "The Board opposes intervention in *Fafnir*. A charged party may incur a liability on account of an order being entered against him. Fairness to him thus requires that he be allowed to intervene to preclude that possibility. On the other hand, the Board reasons, the charging party stands only to become a beneficiary of an order entered. As such, he is but another member of the public whose interests the Board is designed to serve. The Labor Board is said to be the custodian of the 'public interest', to the exclusion of the so-called 'private interests' at stake. Support for this view is claimed to be found in our decision in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940). Also, the Board fears that enabling the intervenor to petition for certiorari from an adverse circuit decision will be inimical to the public interest. We disagree.
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> "In prior decisions this Court has observed that the Labor Act recognizes the existence of private rights within the statutory scheme. These cases have, to be sure, emphasized the 'public interest' factor. To employ the rhetoric of 'public interest', however, is not to imply that the public right excludes recognition of parochial private interests. A perusal of the statutory scheme and of the Board's Rules and Regulations is illustrative.
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> "The statutory machinery begins with the filing of an unfair labor practice charge by a private person, § 10(b) 61 Stat. 146; see also 24 Fed. Reg. 9102 (1959), 29 CFR § 102.9 (1965). When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in

the agency's control, but the charging party is accorded formal recognition: he participates in the hearings as a 'party'; he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and may file a petition for reconsideration to a Board order, 28 Fed. Reg. 7973 (1963), as amended 29 CFR § 102.46 (1965). Of course, if the Board dismisses the complaint, he can obtain review as a person aggrieved, which serves the 'public interest' by guaranteeing that the Board interpretation of the relevant provisions accords with the intent of Congress.

"And that the charging party may have vital 'private rights' in the Board proceeding is clear in this very case, which also involves, potentially, a breach of the parties' collective bargaining agreement. Under our decisions in the *Steelworkers* trilogy, 363 U.S. 564, 574, 593, and *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, the Union could take whatever contractual claim it had to arbitration and from there to a federal court. And while it is true that the rights and duties under § 301 (a) of the Labor Act, 61 Stat. 156, are not coextensive with those redressed in Labor Board proceedings, a determination by an appellate court that the Union has no statutory right to conduct its own time studies will surely have an impact upon a later decision by an arbitrator or an appellate court under § 301(a) on the contractual issue.

"In short, we think that the statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests. Rather, the two interblend in the intricate statutory scheme"[7] (footnotes omitted).

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[7] At this point the *Scofield* opinion turned to *Amalgamated Utility Workers*. Although questioning whether the rationale of that ruling survived the 1947 amendments, the Court did suggest that *Amalgamated* may still deny *"the right of a private party to institute a contempt proceeding*

Not only did *Scofield* find that the statute as amended "does not dichotomize 'public' as opposed to 'private' interests," it cast specific doubt upon the vitality of the *ratio decidendi* of *Amalgamated* after the 1947 amendments:

> "The Court [*in Amalgamated Utility Workers*] placed great weight upon the language and legislative history behind § 10(a), 49 Stat. 453, as it read at that time:
>
> 'The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive,* and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise.'
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> "The italicized portion of § 10(a) was deleted in the Taft-Hartley amendments to the Wagner Act in 1947, when Congress added the union unfair labor practice provisions and enacted § 301(a). While it is true that the Labor Board does not confer a private administrative remedy, it is equally true that since 1947, it serves substantially as an organ for adjudicating private disputes" (382 U.S. at 221, n. 18).

We deem it a fair reading of this Court's exposition in *Scofield* that the rationale of *Amalgamated* has not survived the 1947 amendments, by virtue of which the Labor Board now "serves substantially as an organ for adjudicating private disputes". Thus it is to be doubted whether

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—where the Board's expertness in achieving compliance with orders is challenged." We emphasize hereafter (*infra* p. 15) that petitioner did not undertake to institute any contempt proceeding below, but sought only to intervene and by a show cause proceeding *against the Board* to invoke judicial construction of the order requiring full reinstatement of strikers without prejudice to their seniority rights.

Amalgamated Utility Workers still precludes judicial recourse to charging parties for enforcement of "private rights" provisions of Board orders—such as orders of striker reinstatement, back pay, and the like. Particularly is this so in the present case, where petitioner does not ask to commence a private contempt proceeding but rather to bring to judicial resolution its dispute with the Board over the scope and effect of the court-enforced "full reinstatement" guarantee.

iii. *It is particularly to be doubted that Amalgamated now bars a charging party from review of its dispute with the Board over the meaning and effect of a "full reinstatement" guarantee.*

This Court's *Scofield* opinion, although it found the "public rights" premise of *Amalgamated* no longer tenable, did nevertheless suggest that even after the 1947 amendments *Amalgamated* may survive in its narrowest holding to deny in Labor Board cases "the right of a private party to institute a contempt proceeding" challenging the Board's "expertness in achieving compliance" (382 U.S. at 221). But petitioner did not file any contempt petition; it sought to intervene in the Court below and institute a proceeding against the Board itself, to clarify the meaning of the court-enforced order of "full reinstatement" for the strikers. The question petitioner most desires the Circuit Court to resolve is whether—as required by the statute and the enforced remedial order of the Board—an employer has granted full reinstatement and seniority to unfair labor practice strikers when upon their return he abolishes the existing seniority system and gives job priority to after-hired non-unionists.[8] Even if *Amalgamated* retains suffi-

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[8] The subject of the instant case—seniority of reinstated strikers *vis a vis* strike replacements—has been an area of frequent and difficult contest before the Board and the reviewing courts. See, generally, *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, and cases there cited.

cient vitality to preclude a charging party from filing a contempt petition, we cannot believe that after 1947 *Amalgamated* bars a party granted specific relief under a remedial Board order from litigating in the enforcing court its dispute with the Board concerning the meaning and scope of that order.[9]

Indeed, even *before* the 1947 statutory changes eroding the "public rights" rationale of *Amalgamated,* this Court had established that *a party protected by a decree originally secured in a "public rights" litigation has standing to seek clarification and modification of the decree's private rights guarantees.* That is the teaching of the ruling in *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U.S. 502, issued shortly after *Amalgamated,* and recently reaffirmed and followed in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129. There, an anti-trust suit brought by the Attorney General had resulted in a court decree which included certain provisions protecting the private injured parties. Thereafter, in proceedings to

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[9] We do not understand the Board to claim any unreviewable decisional power in its disposition of unfair labor practice cases. Indeed this is so even with respect to charging party appeal from the Board's settlement of the case (*Textile Workers* v. *NLRB,* 294 F. 2d 738, 741), the Board itself having conceded that where it settles with the employer the union may "contest the validity of the consent order" (*id.* at 739, n. 1). See also *Leeds & Northrup Co.* v. *NLRB,* 357 F. 2d 527; *Retail Clerks* v. *Food Employers Council, Inc.,* 351 F. 2d 525.

Moreover, unreviewable Board power is particularly inappropriate with respect to the construction of a Board order enforced by a judicial decree: ". . . the literal language of the [Board] order . . . when separated from findings and standing alone in the Court's enforcement order . . . becomes the language of the Court, and the Court would not be bound to look upon the Board's construction as its own." *J. I. Case Co.* v. *NLRB,* 321 U.S. 332, 341. And as this Court recently noted in an analogous context, "We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. The Department of Justice, however, by stipulation or otherwise has no authority to circumscribe the power of the courts to see that our mandate is carried out." *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129, 136.

reopen the decree the protected private parties sought to intervene for extension of their rights under the decree. Intervention was denied by the District Court, and that ruling was defended in this Court on the ground (312 U.S. at 505) that *"the Attorney General is the guardian of the public interest in enforcing the antitrust laws"*, and *"a decree already entered should not be impeached by intervention."* This Court directly refuted these contentions and reversed the order denying intervention:

> "All of these arguments misconceive the basis of the right now asserted. Its foundation is the consent decree. We are not here dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their individual emphasis. Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court. *But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.*
>
> "That is the present case. Panhandle's right to economic independence was at the heart of the controversy. An important aspect of that independence was the extension of its operations to permit sales in Detroit. The assurance of this extension was deemed so vital that it was safeguarded by explicit provisions in the decree. Section IV, which is in full in the margin, contained those provisions, and by Section V, also set out below, Panhandle, 'upon proper application',

could 'become a party' to the suit 'for the limited purpose of enforcing the rights conferred by Section IV'. Mokan, on behalf of Panhandle, claimed that Columbia Gas had made financial arrangements, which we need not detail, that would in practice defeat the free enterprise of Panhandle. We are not concerned with the substantiality of this claim. The sole question before us is whether there was standing to make the claim before the district court. We hold there was such standing. To enforce the rights conferred by Section IV was the purpose of the motion. Therefore, the codification of general doctrines of intervention contained in Rule 24(a) does not touch our problem. And since the protection afforded Panhandle by Section IV of the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable. See *Credits Commutation Co.* v. *United States,* 177 U.S. 311, 316; cf. *Cobbledick* v. *United States,* 309 U.S. 323. *Nor can the enforcement of this protection be deemed remotely in conflict with the public duties of the Attorney General, nor to bring in digressive issues, nor to impeach the existing decree. It is a vindication of the decree.''* (312 U.S. at 506-508; emphasis supplied).

Just as in *Missouri-Kansas Pipe Line,* intervention has been denied in the present case although the underlying court decree originally secured in a proceeding brought by the Government expressly protects "private rights". The provisions of the Ninth Circuit's decree safeguarding striker reinstatement rights directly invokes the *Missouri-Kansas Pipe Line* stricture that where the enforcement of a public law "also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to

the public authorities . . ." Whatever vitality may still inhere in *Amalgamated Utility Workers* as concerns a private contempt petition, surely it does not commit to the unreviewable authority of the Labor Board a dispute concerning the meaning of a judicial decree awarding "private rights" of job reinstatement to unfair labor practice strikers.

Conclusion

The plain meaning of Section 10(f) of the NLRA supports the standing of a party protected by an enforced Labor Board order to seek judicial review and relief when those protections are violated. At a time when the statute's unfair practice prohibitions applied only to employers and were said to safeguard purely "public rights", *Amalgamated* approved an exception to usual principles of aggrieved party standing to invoke judicial review. But this Court's recent pronouncements in *Scofield* indicate that the "public rights" rationale of *Amalgamated* has not survived the 1947 NLRA amendments. The question now requiring resolution is what remains of *Amalgamated* and its preclusion of judicial recourse to a party asserting violation of private rights safeguarded by a court-enforced order of the Labor Board. The question is an important one in the administration of the statute and ripe for this Court's resolution.

It is respectfully submitted that the writ should be granted.

Respectfully submitted,

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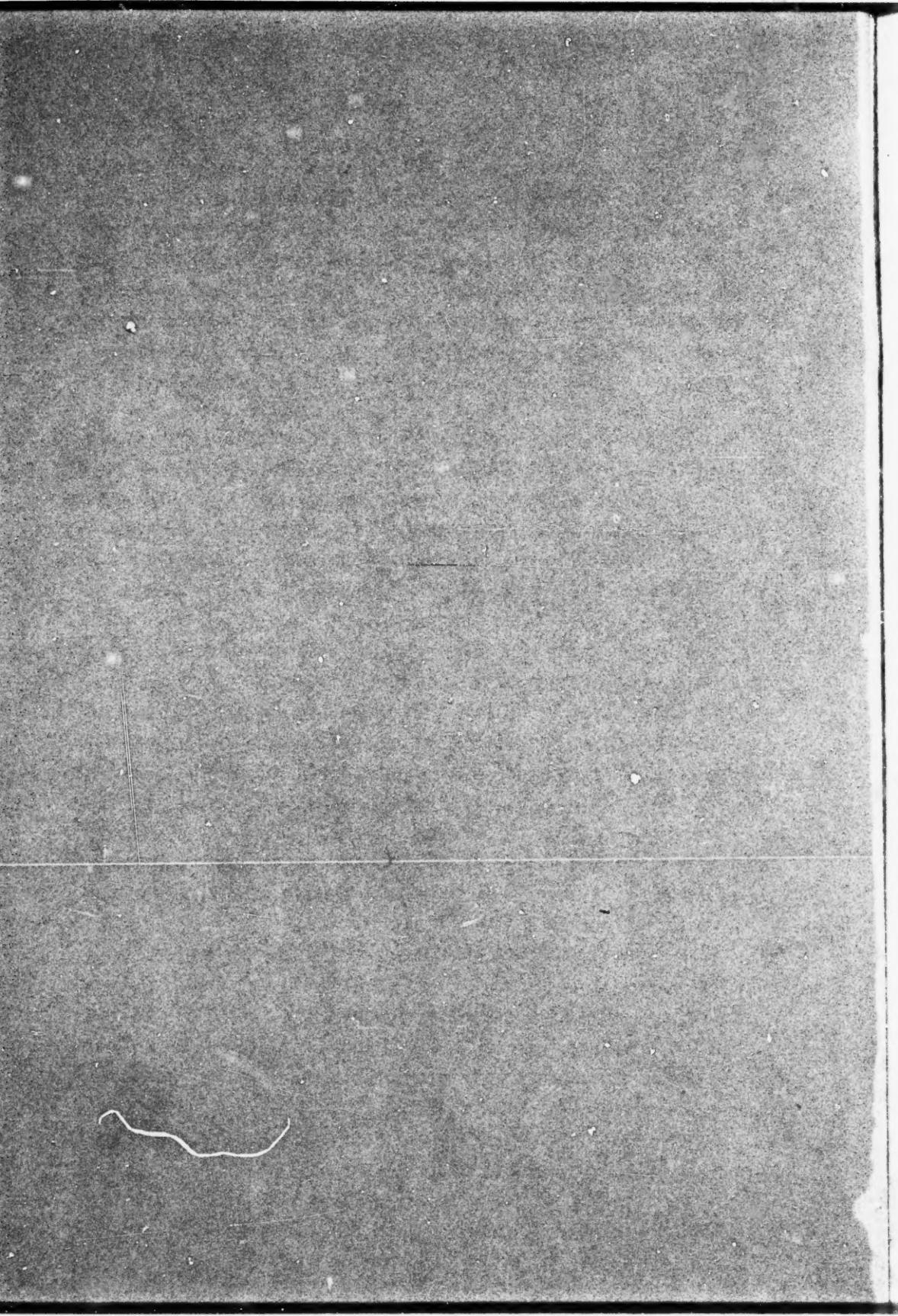

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,046

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

WESTERN WIREBOUND BOX CO., *Respondent*

Jan. 19, 1966.

Before: HAMLEY, JERTBERG and MERRILL, Circuit Judges

HAMLEY, Circuit Judge:

The National Labor Relations Board seeks enforcement of its order directing Western Wirebound Box Co. to cease and desist from certain asserted unfair labor practices and to take specified corrective action.

The principal unfair labor practice, as found by the Board, was the refusal of the company to bargain in good faith with the representative of its employees, International Woodworkers of America, Local Union 3-3 AFL-CIO. Specifically, the failure to bargain consisted of the company's refusal to produce certain records tending to substantiate its position during the negotiations for a new contract. This was held to be a violation of section 8(a) (5) and (1) of the National Labor Relations Act (Act), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a) (1964).

The relevant facts, stated below, are drawn from the trial examiner's findings of fact.[1] In 1961, a contract was reached between the union and the company providing for an hourly wage increase of 7½ cents. In March, 1962, in anticipation of the expiration of the contract on June 1 of that year, the company wrote to the union stating that it

[1] In their respective briefs filed in this court, each party has referred to the testimony favorable to it, as reviewed in the trial examiner's decision, as if such testimony constituted the established facts of the case. The testimony, however, was in dispute, and we have made an effort to refer only to those portions of the trial examiner's decision which review undisputed testimony, or which appear to represent findings of fact.

was continuing to suffer from the competition of other manufacturers of paper containers and Southern manufacturers of wirebound containers. In order to maintain a competitive position, the company advised, it was necessary to ask its employees to accept a wage reduction of eight cents an hour. About the same time that this letter was written, the union wrote that it desired to negotiate a wage increase of ten cents an hour.

Beginning on May 1, 1962, a number of meetings took place between the parties. At the third meeting, on May 21, 1962, Walter Green, president of the company, said that he was willing to give a wage increase, or perhaps a smaller wage cut, to those in the ender classification, but insisted upon a wage cut of eight cents for the others. In response to a question by a union representative, Green answered that he was not saying that the company was unable to pay the wage increase demanded.

At the opening of the fourth meeting, held on May 28, 1962, Green announced that he was receding from the eight-cent figure and was now offering to settle for a four-cent wage cut with an increase or lesser cut for the enders. Green said that the cut was necessary because of price cutting indulged in by competition. Wallace Murray, a representative of the union, then said that the union would like to have figures for the past two years relating to productivity, labor and material costs, and price changes.

Green said that such information was not available because a new accounting system was in the process of installation. Green also said that he would not consent to the employment, by the union, of an independent accountant to look at the company's books. However, he offered to make his accountant available to the union for consultation. The union representative said that this would not be satisfactory.

During the first two meetings Green said, in effect, that a failure to bring about a cut in wages would cause the business to operate at a loss and might threaten its existence. The company, however, soon abandoned these arguments by offering to continue the wages then in effect and to grant a small increase to the enders, as described below. In response to later union inquiries, Green replied that the

company was not "pleading inability to pay. Beginning with the later meetings, the company's entire position was based on the assertion that price competition was vigorous.

Still another meeting took place on June 6, 1962. Green there stated that the company was withdrawing from its position that it must have a wage cut. He also offered to increase the wage of the enders by 2½ cents an hour. Murray again asked for productivity and production cost figures, but Green said that they were not available.

That afternoon all parties met with a conciliator of the United States Department of Labor; the meeting was adjourned without an agreement being reached. The negotiators next met on June 11, 1962, in the presence of the conciliator. Nothing was accomplished. A strike was called that morning because the company failed to supply to the union the data requested. The strike was still in effect at the time of the hearing before the trial examiner.

At no time did any spokesman for the union ask for more than figures relating to productivity and unit cost. Despite what Green told union negotiators, the company was not by reason of accounting problems disabled from providing the union with comparative figures for 1961 and 1962, showing gross production, gross labor cost, and gross value of the production.

Relying on *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149, the trial examiner held that, under the indicated circumstances, the company's failure to supply the requested data in support of its contention that it would be competitively disadvantaged by granting wage increases for 1962, constituted a failure to bargain in good faith.

Challenging this finding and conclusion the company argues that a claim of competitive disadvantage, such as was made here, is not within the principle announced in the *Truitt* case.

In *Truitt*, the company would not accede to the union's wage demands because ". . . it could not afford to pay such an increase, it was undercapitalized, had never paid dividends, and . . . an increase of more than 2½ cents per hour would put it out of business." The union asked the company to produce some evidence substantiating these

statements, requesting permission to have a certified public accountant examine the company's books, financial data and the like. This request being denied, the union asked that the company submit "full and complete information with respect to its financial standing and profits. . . ." The company refused all requests, stating that the requested information was not pertinent to the negotiations and the union had no legal right to it.

In upholding the Board order in *Truitt,* the Supreme Court said:

> "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. 152-153.

The quoted language indicates to us that the principle announced in *Truitt* is not confined to cases where the employer's claim is that he is unable to pay the wages demanded by the union. That sort of claim, rather, was held to be covered by the stated broad principles that good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims, and that if an argument is important enough to present during bargaining sessions, it is important enough to require substantiation.

We see no reason why, under the same rationale, an employer who insistently asserts that competitive disadvantage precludes him from acquiescing in a union wage demand, does not have a like duty to come forward, on request, with some substantiation. In both cases, the give-and-take of collective bargaining is hampered and rendered ineffectual when an employer mechanically repeats his claim but makes no effort to produce substantiating data. In one case as well as the other this sort of conduct runs counter to section 204(a) (1) of the Act, 61 Stat. 154 (1947), 29 U.S.C. § 174(a) (1) (1964), which admonishes both employers and employees to "exert every reasonable effort to make and maintain

agreements concerning rates of pay, hours, and working conditions."

It is true that in *Taylor Foundry Company,* 141 NLRB 765, 767, enforced per curiam, *N.L.R.B.* v. *Taylor,* 5 Cir., 338 F. 2d 1003, and *Metlox Mfg. Co.,* 153 NLRB (No. 124), the view is expressed that the principle announced in *Truitt* applies only where the employer claims inability to pay. However, the Board has a right to change its view as long as its new position is not erroneous. As previously indicated, we are of the opinion that the Board did not err here in giving a broader scope to the *Truitt* rule.

The company contends that, even assuming that *Truitt* is applicable, the trial examiner and the Board failed to make a finding of subjective bad faith, as required by that decision. In this connection our attention is called to this language in *Truitt:*

> ". . . a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith. . . . We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." (Footnote omitted.) 351 U.S. at 153-154.

The decision of the trial examiner contains a lengthy recital of the evidence and definite findings on the several questions of fact. While these findings do not contain a specific statement to the effect that the company was guilty of subjective bad faith, we think that this is implied in the findings read as a whole. The trial examiner specifically found that, by refusing to produce records "in the circumstances described," the company refused to bargain with the union. This demonstrates that the examiner did not regard *Truitt* as laying down a *per se* rule to be applied automatically, but predicated his decision on the particular

facts of this case. The Board adopted the findings and conclusions of the examiner.

Insofar as the findings reveal, the employer's claim was that the competition it was encountering made it imperative that costs be minimized. The company asserts that its duty to substantiate this claim was fulfilled when it offered to make available wage data of its competitors and other information about competing products.

In support of this assertion, the employer refers us to the testimony of Walter W. Green, president of the company, and to two exhibits. The facts testified to by Green on this point have no counterpart in the trial examiner's findings, and therefore do not constitute the established facts of the case. The company has not contended that the trial examiner's findings are inaccurate or incomplete in any respect.[2] The exhibits to which our attention is called do not bear upon this factual issue.

While the information offered with respect to competitors' wages and products may have been relevant, it was less than adequate substantiation. We are therefore of the view that the company is not now in a position to assert fulfillment of its duty to substantiate its claim by reason of an asserted willingness to produce this type of data.

The failure of the company to produce data supporting its claim constituted failure of its duty, under *Truitt,* unless: (1) no request was made for such data; or (2) such data could not be supplied.

The trial examiner found that at no time did the union ask for more than figures relating to productivity and unit cost. And, although detailed unit cost figures were not readily available, the examiner held that:

> ". . . Green could hardly have been mystified in the matter. He must have understood that the Union was seeking some sort of showing that the Respondent was or was not producing more (that is products of greater gross value) in 1962 than it had with a larger work force in 1961. I find contrary to the contention of the Re-

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[2] The company, moreover, has taken exception in its brief to the reference to disputed testimony rather than findings in the Board's brief.

spondent that it could have provided the Union with figures at least approximating those requested."

We think this is a supportable finding and reasonable conclusion having in view all of the facts of the case. The duty to substantiate a claim upon request, established by *Truitt,* is not to be defeated because the union fails to ask for the precise kind of information which is relevant to the claim, or because the company although capable of supplying relevant information, is unable to supply other relevant or irrelevant data specifically requested by the union. The hallmark of lawfully adequate negotiations for a collective bargaining agreement is good faith, and good faith contemplates that both negotiating parties will do what is reasonably possible to reach agreement. Negotiations are to be at arm's length but this does not contemplate erection of artificial barriers and resort to patent technicalities to obfuscate the proceedings.

The other contentions advanced by the company in opposition to enforcement of the order have been examined. In our opinion they are either without merit or are premature at this stage of the proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,046

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

WESTERN WIREBOUND BOX CO., *Respondent*.

DECREE

Before: HAMLEY, JERTBERG, AND MERRILL Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, its officers, agents, successors and assigns, on February 6, 1964. The Court heard argument of respective counsel on December 10, 1965, and has considered the briefs and transcript of record filed in this cause. On January 19, 1966, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order. In conformity therewith, it is hereby,

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that Western Wirebound Box Co., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with International Woodworkers of America, Local Union 3-3, AFL-CIO, as the exclusive bargaining representative of Respondent's employees in the aforesaid appropriate unit.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Upon application, offer the employees who went on strike June 11, 1962, immediate and full reinstatement to

their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, or place them on a preferential hiring list, in the manner set forth in the section of the Trial Examiner's Decision dated February 6, 1964, entitled "The Remedy", as modified herein, and make them whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy" as modified herein.

(b) Upon request, bargain collectively with International Woodworkers of America, Local Union 3 3, AFL-CIO, and supply that organization with accounting data or other relevant information from Respondent's records bearing upon Respondent's position that a wage increase would adversely affect its competitive situation.

(c) Post at its plant in Portland, Oregon, copies of the notice attached hereto as an Appendix. Copies of said notice to be furnished by the Regional Director for the Nineteenth Region of the National Labor Relations Board (Seattle, Washington) shall, after being signed by a representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notice is not altered, defaced or covered by any other material.

(d) Notify the said Regional Director in writing within 10 days from date of this Decree what steps the Respondent has taken to comply herewith.

Endorsed, Decree Filed and Entered

[Feb. 19, 1966]

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,046

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

WESTERN WIREBOUND BOX CO., *Respondent,*

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL UNION 3-3, AFL-CIO, *Petitioner for Intervention,*

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR INTERVENTION

Comes now the Petitioner, INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL UNION 3-3, AFL-CIO, and pursuant to Rule 34-6 of the rules of this Court respecting intervention in enforcement proceedings, of orders of administrative agencies, and Rule 15 of the Rules of this Court respecting motions, moves to intervene in the above captioned proceedings.

Nature of Movant's Interest

The moving party is a labor organization and is the collective bargaining representative of respondent's employees. The movant is the beneficiary of this Court's enforcement Decree, endorsed, filed and entered on the 19th day of February, 1966.

The Grounds Upon Which Intervention Is Sought

The moving party herein desires to intervene for the purpose of compelling the National Labor Relations Board to show cause to this Court, if any it may have, why the decree of this Court entered in this case on February 19, 1966, has not been complied with, and to further show cause why the National Labor Relations Board has not sought to compel the respondent, Western Wirebound Box Co., to comply with the decree of this Court.

This motion and petition is based on the records and files in this cause and the affidavit of Harvey R. Nelson, filed in support hereof. That the affidavit of Harvey R. Nelson on file herein shows that the respondent, Western Wirebound Box Co., has not complied with the aforesaid described decree; and said affidavit further shows that the National Labor Relations Board and its General Counsel have not sought to compel Western Wirebound Box Co. to comply with the decree of this Court.

That intervention by the moving party is necessary to preserve the public and private benefits conferred by the decree of this Court, entered February 19, 1966.

This petition is likewise supported by a statement of points and authorities, attached hereto, as required by Rule 15, of this Court.

WHEREFORE, your petitioner prays that this Court enter an order granting petitioner standing in this proceeding as an Intervenor, and forthwith issue an order to show cause to the National Labor Relations Board as herein prayed for.

Your petitioner further prays that this Court grant such further equitable relief as it deems just and proper in the premises.

Dated June 7, 1968.

INTERNATIONAL WOODWORKERS OF AMERICA,
LOCAL UNION 3-3, AFL-CIO,
Petitioner for Intervention.

By A. C. ROLL,
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[Filed July 2, 1968]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,046

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

WESTERN WIREBOUND BOX CO., *Respondent.*

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL UNION 3-3, AFL-CIO, *Petitioner for Intervention,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

BOARD'S OPPOSITION TO MOTION TO INTERVENE

I. Statement

The National Labor Relations Board hereby opposes the motion of the International Woodworkers of America, Local Union 3-3, AFL-CIO (hereinafter called "Union") "to intervene" to compel the Board to show cause "why the decree of this Court entered in this case on February 19, 1966, [against Western Wirebound Box Co.] has not been complied with" and why it has not sought the Company to comply.

On February 6, 1964, the Board issued its order against the Company requiring it *inter alia* to bargain in good faith with the Union, to supply the Union with organizational and accounting data bearing on the Company's competitive situation, and, upon application, to reinstate unfair labor practice strikers to their former positions, without prejudice to their seniority or other rights and privileges. 145 NLRB 1539. This Court enforced the Board's order on February 19, 1966, 356 F. 2d 88. Except for the instant motion, no proceeding was instituted by any party since that time and none is pending before the Court. However, since entry of the decree, running disputes have existed between the Union and the Company both as to the Company's compliance with the bargaining order and as to the

validity of the reinstatement of many of the unfair labor practice strikers. Though the parties have met and bargained, the Union has faulted the Company for offering terms and conditions less attractive than those which prevailed during the term of the expired collective bargaining agreement, and for adopting a "take it or leave it" attitude in connection with its proposals. The Union has also contended that financial data supplied by the Company has been inadequate. As to the unfair labor practice strikers, the Union's position has been that though most of them have been rehired, none has been restored to his former job, and that each is being prejudiced as to his seniority and other rights and privileges.

On the other hand, the Company has contended that the Union rather than the Company is actually guilty of bad faith bargaining. It points out that the Union has not requested any meeting with the Company for the last 9 months. It further shows that the Union has taken the unreasonable position that the only subjects open for negotiation are those which the Union has chosen to designate, to wit, wage increases and job evaluation, and as to every other term and condition of employment, the Union has asserted that the Company must reinstate the pre-existing labor contract under the Board and Court orders, and that a refusal to do so constitutes a continuing violation of the Court's decree. The Company also contends that it has furnished all the requested information which is available. As to the reinstatement issue, in 1963, when the strikers made application to return, only 37 jobs were in existence due to a cutback in production. At that time, the returning strikers were afforded whatever work was available and were restored to their former jobs, so far as possible under the prevailing conditions. Later however, the Company's business increased, the unit was expanded, and distinct job classifications were recognized.

At present, the Board's Regional Office is conducting a very intensive investigation of the Company's books and records to determine whether in fact the strikers were discriminated against in the restoration of their jobs and whether the Company has wrongfully withheld available information from the Union. This investigation should be

completed very soon, and if contempt proceedings appear to be warranted, an appropriate recommendation will be made to the Board. As the Court is aware, contempt proceedings are instituted only upon formal authorization by the Board on consideration of all the facts in each particular case. See *Vapor Blast Independent Shop Worker's Ass'n.* v. *Simon,* 305 F. 2d 717, 719 (C.A. 7, 1962).

The post-decree history of this case has also been complicated by the Company's repeated demands that the Board close its files on this case because it has been in compliance with the outstanding decree; and by a petition for an election which it filed to determine whether the Union still enjoys a majority of the employees in the unit. Based upon its earlier investigations of this dispute, the Region rejected the Company's Representation Petition on the ground that compliance with the decree had then not as yet been achieved. However, as pointed out above, it has not yet recommended the institution of contempt proceedings against the Company.

The Union, the private, successful charging party in this proceeding, apparently dissatisfied with the Company's performance and the Board's procedures, is now asking this Court for permission to intervene so that it can force the Board to seek what it regards as satisfactory compliance. As we shall demonstrate, this motion is not supported by reason or authority, and should be denied.

II. Argument

Even were a proceeding now pending before this Court,[1] intervention should be denied because the Union is seeking to intervene for an invalid purpose. In no instance, so far as the brief writers are aware, has any court ever directed the Board to institute or permitted another party or person to institute proceedings to compel compliance with a decree enforcing a Board order. On the contrary, it has

[1] As we pointed out above, no proceeding is now pending before the Court. Moreover, Rule 15(d) of the Rules of Appellate Procedure [formerly Rule 34(6) of the Court] requires the motion to intervene to be filed within 30 days of the date on which the petition to review is filed and though relied on by the Union, is really inapplicable to this situation.

long been settled, as the Supreme Court said in *Southport Petroleum Co.* v. *N.L.R.B.*, 315 U.S. 100, 106 fn. 5 (1942), "Such proceedings may be instituted only by the Board".

The Seventh Circuit elaborated on this rule in *Vapor Blast Independent Shop Workers* v. *Simon*, 305 F. 2d 717, 720 as follows:

> In sum that part of the petition seeking the compulsory institution of contempt proceedings must be dismissed for the reason that "as the Court has no jurisdiction to enforce the order at the suit of any private person or group of persons, we think it is clear that the court cannot entertain a petition for violation of its decree of enforcement save as the Board presents it". Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 270, 60 S.Ct. 561, 84 L.Ed. 738 (1940); Stewart Die Casting Corp. v. National Labor Rel. Board, 7 Cir., 132 F. 2d 801, 803 (1942).

We believe that the reasons for this rule are important and persuasive, and, as we show below, wholly in consonance with *International Union Local 283* v. *Scofield*, 382 U.S. 205, upon which the movant so heavily relies.

It has been said time and again that the National Labor Relations Act is designed to enforce public rather than purely private rights and that the Board should not be utilized solely for the purpose of advancing a private grievance. *Vaca* v. *Sipes*, 386 U.S. 171, 182, n. 8 (1967),[2] *N.L.R.B.* v. *Mooney Aircraft, Inc.*, 366 F. 2d 809, 811 (C.A. 5, 1966). Thus a private party cannot compel the Board to issue a complaint[3]; nor to dismiss a proceeding once instituted[4]; nor can it veto a settlement between the General Counsel and one of the parties.[5] Similarly, a private

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[2] In *Vaca* v. *Sipes*, the Court said: "The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies."

[3] *Balanyi* v. *IBEW*, 374 F. 2d 723 (C.A. 7, 1967).

[4] *N.L.R.B.* v. *Wemyss*, 212 F. 2d 465, 468 (C.A. 9, 1954).

[5] *Textile Workers* v. *N.L.R.B.*, 294 F. 2d 738 (C.A.D.C., 1961).

party cannot force the Board to seek enforcement of one of its orders,[6] or a contempt adjudication after enforcement.[7] As the Court said *Stork Restaurants,*

> Enforcement of an order in the labor field is quite different from the execution of a money judgment by a deputy marshal or sheriff. The many different interpretations of sections of the Act given by various courts attest to the difficulty of stating hard and fast rules with certainty. This court, therefore, should not tell the Board how it should act, or whether it should act, in this particular situation. 312 F. 2d at 106.

Nothing in *Scofield* requires a departure from these precedents. That case did not involve compliance with a Board order already enforced but whether a Board order should be enforced. In deciding that in proceedings to enforce Board orders, the successful charged and charging parties have the right to intervene, the Supreme Court relied on reasons which are wholly inapposite here. The Court permitted intervention there for three telling reasons. First, it would avoid unnecessary duplication in case the Appellate Courts were to reverse the Board's decision and convert a successful to an unsuccessful party, the latter admittedly having standing as a party. Second, it would be unfair to the now unsuccessful party, on a new appeal, to be faced with a crystallized Appellate Court position toward which it had been unable to contribute originally. Third, it would avoid the anomalous situation that one who loses at the Board level has a right to be heard by an Appellate Court, while one who is successful, does not.

None of these considerations apply in an application for intervention by a successful party in post-appellate proceedings. There are no possible duplications to avoid; no unfairness to a party which may be faced with a Court decision to which it could not contribute; and no disadvan-

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[6] *Amalgamated Utility Workers* v. *Consolidated Edison,* 309 U.S. 261, 269 (1940); *Stork Restaurants, Inc.,* v. *McLeod,* 312 F. 2d 105 (C.A. 2, 1963).

[7] *Vapor Blast, supra; United Steelworkers of America* v. *N.L.R.B.,* 389 F. 2d 295, 298 (C.A.D.C., 1967).

tage vis-a-vis other private parties, since no private party has any standing as protagonist in compliance litigation.[8] Moreover, whereas in proceedings to enforce Board orders, the countervailing private and public policy considerations can readily be accommodated, in contempt proceedings, civil or criminal, or both, the public policy considerations are overriding. Thus the Court said in *United Steelworkers* v. *N.L.R.B., supra,* (at p. 298):

> Certainly the final responsibility for interpreting the Board's order must rest with the Board, for "the relation of remedy to policy is peculiarly a matter of administrative competence." *Phelps Dodge Corp.* v. *N.L.R.B.,* 313 U.S. 177, 194 (1941). And, indeed, it is only the Board that can initiate contempt proceedings even where its order has been enforced by a judicial decree. *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U.S. 261 (1940).

The significance of the difference between the situation in *Scofield* and that here was expressly recognized by the Supreme Court when it noted that it did not intend to impair the holding in *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U.S. 261 *supra,* and stated, "we find nothing inconsistent in denying the right of a private party to institute a contempt proceeding—where the Board's expertness in achieving compliance with orders is challenged—and, on the other hand, in permitting intervention in a proceeding already in the court for decision". *Auto Workers* v. *Scofield, supra* at 221.[9]

As we have already indicated, other Court of Appeals have denied relief substantially similar to that requested by the Union in this case. In *N.L.R.B.* v. *Rice Lake Cream-*

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[8] As a matter of practice, the Board does not exercise its discretion in the disposition of compliance issues without first affording all parties who may be affected a reasonable opportunity to present their views and arguments. *Cf.* Sec. 101.9 of the Board's Rules and Regulations, as amended July 4, 1967. See also *Textile Workers, supra.*

[9] The other cases relied on by the Union suffer from the same infirmity as its reliance on *Scofield* since all of them involve, as did *Scofield,* intervention at the Court of Appeals level, not the compliance level. None of them, therefore, is pertinent to the present proceeding.

ery Co., 65 L.R.R.M. 2960 (C.A.D.A., 1967), the District of Columbia Court of Appeals denied a motion to intervene by twenty-one employees who wished to enforce backpay awards against a company found guilty of unfair labor practices. In *Vapor Blast Independent Shop Workers' Ass'n.* v. *Simon*, 305 F. 2d 717 (C.A. 7, 1962), the Court dismissed a writ of mandamus to compel the Board, *inter alia*, to commence contempt proceedings against an employer. See also *Stork Restaurants, Inc.* v. *McLeod, supra*, and *N.L.R.B.* v. *Kohler Co.*, 351 F. 2d 798, 809 (C.A.D.C., 1965).

III. Conclusion

The achievement of compliance with a Court-approved Board order is peculiarly within the province of the Board's expertise. To permit private parties to force the Board to adopt measures which they favor rather than those the Board believes will more effectuate the purposes of the Act would lead to undesirable results and involve the Courts in an area which has heretofore been left to Board discretion. The Supreme Court has clearly recognized these considerations in its *Scofield* opinion. The petition of the Union to intervene should be dismissed.

Dated at Washington, D.C. this 29th day of July, 1968.

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APPENDIX E

Filed Aug. 9, 1968. Wm. B. Luck, Clerk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20046

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

WESTERN WIREBOUND BOX CO., *Respondent*.

ORDER

Before: HAMLEY, JERTBERG and MERRILL, Circuit Judges

The motion of International Woodworkers of America, Local Union 3-3, AFL-CIO, for leave to intervene herein for the purpose of compelling the National Labor Relations Board to show cause to this Court why the decree of this Court, entered herein on February 19, 1966, following the opinion filed herein on January 19, 1966, 356 F.2d 88, has not been complied with, and to further show cause why the National Labor Relations Board has not sought to compel respondent Western Wirebound Box Co. to comply with the decree of this Court, is

Denied.

FREDERICK G. HAMLEY,
GILBERT H. JERTBERG,
CHARLES M. MERRILL,
United States Circuit Judges

(5652-3)